IN THE
SUPREME COURT OF THE UNITED STATES

NO. 76-1634

In the Matter of the Estate of
JOSEPH R. BAER, Deceased

MARCELL BAER and WESLEY A. BAER,
Executors of the Estate,

Appellants

vs.

JENNIE BAER,

Appellee

MOTION TO DISMISS

Appeal from the Supreme Court of Utah

Case No. 14676

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OPINION BELOW

The opinion of the Utah Supreme Court in this matter appears in 562 P.2d 614 (1977). It is set forth in Appellants' Appendix.

FACTS

This case arises from an Order Confirming Sale of Real Estate and Personal Property, in the matter of the Estate of Joseph R. Baer, Probate No. 7909 in the District Court for Cache County, State of Utah, a copy of which is set forth in the Appendix, infra, at page 14, which confirmed the sale of decedent's real estate and personal property for $32,000 as provided in the Will. Clarifications in the Statement of the Case as presented by the Appellants should be noted.

Joseph Baer died at the age of 91. He had twelve children by two wives prior to Appellee, six by the first wife and six by the second. There was no issue of the marriage between Appellee and Joseph Baer. There were, however, six unmarried children home at the time Appellee and decedent were married whom Appellee helped raise after their marriage. Of decedent's six sons, only two remained at home to work on the farm; the others left the area.

Appellee and Joseph Baer were married 33 years, which was longer than the combined marriage time to his prior two wives and during which time Appellee also helped with the farming operation. Further, although the land in question has been appraised as low as $60,000 by Appellants, appraisals commissioned by the widow indicate the property is worth $220,000.

In his Will, Baer gave his six sons the option of purchasing the entire farm and equipment for $32,000 and made a meager provision of $70.00 per month with the right to live in the family home for life for his widow. On May 6, 1976, the widow elected against the Will.

All six sons exercised the option provided in the Will in a timely fashion and moved the District Court to confirm the sale of the property. After an objection to confirmation of the sale was made by Appellee, the court in a Memorandum Decision set forth in Appellee's Appendix, confirmed the sale on June 4, 1976, pursuant to § 75-10-3 and § 75-10-17 Utah Code Annotated, 1953. [hereinafter cited as U.C.A.]

The District Court held that the widow was entitled to a one-third interest in the property as provided under § 74-4-3 and 74-4-4, but that the value of the property was set in the Will as $32,000. The widow, Jennie Baer, appealed to the Supreme Court of Utah. Appellant did

not cross appeal and apparently accepted the District Court's holding that the widow is entitled to a one-third interest. The sole issue was whether the value of the surviving widow's one-third was set by the Will or § 74-4-3 and 74-4-4.

The Utah Supreme Court reversed the lower Court, allowing the widow a one-third interest in the value of the real property. In its decision, the Court stated that the widow complied with all necessary requirements of applicable statutes and that the executors position is "untenable", not on constitutional grounds, but on the grounds that their reading of the statute "disregards the purpose and objectives of the laws pertaining to such sales, especially as they relate to § 74-4-3 and 74-4-4."

The Utah Court ordered the lower Court to award the widow her one-third share of decedent's real property, some of which was inherited and some of which was acquired during his first marriage.

The executors now appeal the decision to the United States Supreme Court pursuant to 28 U.S.C. § 1257(2). On May 23, 1977, Appellant's filed the Jurisdictional Statement.

POINT I

THE APPEAL FROM THE UTAH SUPREME COURT DECISION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant contends that Sections 74-4-3 and 74-4-4, Utah Code Annotated, 1953 are invalid as being repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The law is clearly to the opposite effect, rendering the question of this appeal insubstantial.

This Court's explanation of insubstantial federal ques-

tions in *Ex parte Poresky,* 290 U.S. 30, 31-32, 54, S. Ct. 3,4-5, L.Ed, 152 (1933) is dispositive of this case in holding that a question may be insubstantial either because it is "obviously without merit" or because "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subjct of controversy. *Levering and Garrigues Co.* v. *Morrin,* 289 U.S. 103, 105, 53 S. Ct. 549, 550, 77 L.Ed. 1062 (1933); *Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288, 30 S. Ct. 326, 54, L.Ed. 482; *McGilvra* v. *Ross,* 215 U.S. 70, 80, 30 S. Ct. 27, 54 L.Ed. 95 . . ." It is clear that decisions of this Court foreclose any controversy regarding equal protection, based on the facts of this case. The following analysis has its inception in *Reed* v. *Reed,* 404 U.S. 71, 30 L.Ed. 2d, 225, 92 S. Ct. 251 (1971), the first recent decision concerning gender-based discrimination.

In *Reed, supra,* the Court invalidated a probate statute which denied a female the opportunity to become the administrator of an estate of a decedent if a male were equally entitled to administer. In applying the Equal Protection Clause of the Fourteenth Amendment, the Court reiterated the test for determining a constitutionally permissible discrimination:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference and having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415, 40 S. Ct. 560, 561, 64 L.Ed 989 (1920)." *Reed, supra,* at 254.

The decision further recognizes that there are permissible classifications which the states are not prohibited from making.

> In applying that clause [the Equal Protection Clause], this Court has consistently recognized that the Fourteenth Amendment does not deny to the States the power to treat different classes of persons in different ways. *Reed, supra,* at 253, and cases cited therein.

The following term, this Court decided *Frontiero v. Richardson,* 411 U.S. 677 in which it held invalid an act of Congress, providing that a male serviceman could claim his wife as a dependent upon no evidence of dependency, whereas a female member of the armed services had to prove the dependency of the husband before she could claim his dependency. Again the Equal Protection Clause was relied upon to hold the discrimination unconstitutional.

Later, however, a Florida statute which allowed widows a $500 exemption from property taxes was held constitutional by this Court through its invoking the *Reed* "substantial relation" test. *Kahn* v. *Shevin,* 416 U.S. 351, 40 L.Ed. 2d 189, 94 S. Ct. 1734 (1974), wherein the Court reasoned that the plight of the elderly widows is clearly more critical than that of widowers.

> There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other state exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs . . . the disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced in to a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.

> There can be no doubt, therefore, that Florida's differing treatment of widows and widowers "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation." *Reed* v. *Reed, supra,* quoting *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415, 64 L. Ed. 989, 40 S. Ct. 560. *Kahn, supra,* at 192-3.

(See also footnote 2, Mr. Justice Rehnquist's dissent in *Califano* v. *Goldfarb*, No. 75-699 (1977) wherein it is stated that in 1974, "two out of three poor persons over 65 were women. Four out of five men over 65 were married, but 52% of aged women were widows. Of older women living alone, 33% were below the poverty line.")

More recently, the equal protection issue of a gender-based discrimination in a Social Security statute which allowed old age benefits obtained by women aged 62 years before 1975 greater than those obtained by men of the same age, was disposed of succinctly in a per curiam opinion. In a lucid analysis of a statute which redresses "our society's longstanding disparate treatment of women," the Court recognized these older women as a group "who as such have been unfairly hindered from earning as much as men." *Califano* v. *Webster,* .... U.S. ...., 51 L.Ed 2nd 360, 97 S. Ct. ..... 1977. In that case the Court upheld the constitutionality of such statute, the purpose of which is analogous to the objective of Sec. 74-4-3 and 74-4-4 — to extend benefits to widows, a traditionally disabled class, in a non-discriminatory mode. Furthermore, in Utah, married women, having been the object of historical discrimination in polygamy, are even guaranteed these property rights in the Constitution of Utah, Article XXII, Sec. 2.

Following the *Reed, Kahn, Webster* rationale, it is clear that unlike the *Frontiero, supra,* fact pattern, this case presents a statute which as the Utah Supreme

Court correctly stated, is "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." *Kahn, supra,* at 193. The statutes in question here do not flatly deny benefits to or cause undue burden on the other sex as did those in *Reed, Frontiero,* and *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975). They do, however, provide for a classification which this Court has already deemed "reasonable" and which rests on a disparity having a "fair and substantial relation to the object of the legislation." The question presents no controversy based on previous decisions of this Court.

Secondly, there is no substantial question involved because the argument of Appellants is "without merit." The Appellants claim a substantial federal question because of a claimed basic right to will property without citing any judicial authority for the establishment of such right. On the other hand, this Court has recognized dower as a right which "while it exists, is attached to the marital contract or relation; and it always has been deemed subject to regulation by each state as respects property within its limits." *Ferry v. Spokane, Portland, and Seattle Railway Company,* 258 U.S. 314, 66 L.Ed. 635, 42 S. Ct. 358 (1922). It therefore rests with the legislature to determine property rights of each spouse. *Ferry, supra,* 20 ALR 1326, 1329. Acquiring this property is a contractual obligation on the parties by implication and cannot be avoided.

The statutes questioned by Appellants create a contractual obligation between the parties in marriage, giving the wife a contractual right in the property that the husband owned at any time during the marriage. This right has been recognized in Utah since statehood and can easily be avoided by a husband by a pre-nuptial

agreement or by placing the property in trust. Instead, he was allowed to enter into a marriage relationship with Appellee when both parties knew or should have known that by such marriage, Appellee would acquire a one-third interest in the real estate he owned. She had the right to rely in contract on that right being given her and, though there would be no question presented here today, if it was not an important consideration of marriage, decedent could have easily removed the property from his estate prior to marriage by contract or by trust.

After they lived together for 33 years in the marriage relationship (to approximately age 90 for both), that he wishes now to give her nothing in return and deprive her of what little right she expected to enjoy is unthinkable. What Appellants seek to do is to have this Court change the effective date of the legislation embodied in the Uniform Probate Code and thereby create ex post facto laws to the detriment of people who have relied on the same. Therefore, the decision made by this Court will not affect Utah law except for those deaths occurring prior to July 1, 1977, and in which such an issue is raised. Although this case is of significant interest to the parties involved, it can scarcely be imagined how it can be of such national import as to require a consideration by this Court.

Furthermore, as Appellants themselves stated in their brief to the Utah Supreme Court, Utah is the only state which, presently, does not provide property rights in both spouses. However, as of July 1, 1977, the Utah Uniform Probate Code will be effective, granting both spouses a one-third statutory interest in a portion of the deceased spouse's property, known as the augmented estate. This law has been passed by the legislature of Utah prior to Mr. Baer's death, but the

effective date was purposely postponed until July 1, 1977, to allow the residents of the state to prepare for the changes. After Idaho became the first state to adopt the Uniform Probate Code, ten other states adopted a similar code, South Dakota being the only one to afterwards repeal: Alaska-Alaska Stat. § 13 (1972), Arizona-Arizona Rev. Stat. Ann. § 14 (Spec. Pamphlet 1974), Colorado-Colo. Rev. Stat. Ann. § 15-10 to - 17 (1973), Minnesota-Minn. Stat. Ann. § 524 (1975), Montana-Mont. Rev. Codes Ann. § 91A (Spec. Uniform Probate Code Pamphlet 1974), Nebraska-Neb. Rev. Stat. § 30-2201 - 2902 (Cum. Supp. 1974), New Mexico-N.M. Stat. Ann. § 32A (Spec. Probate Code Pamphlet 1976), North Dakota-N.D. Cent. Code § 30.1 (Spec. Uniform Probate Code Supp. 1975), and Utah-Utah Code Ann. § 75 (Spec. Uniform Probate Code Pamphlet 1975).

Thirdly, the issues as presented by Appellants for the Supreme Court's attention are in fact not present. The District Court Decision, as shown by Appellee's Appendix, allowed the surviving widow a one-third interest in the property, but set the value of such at the amount specified in the Will and *not* a one-third interest in the actual property involved. Appellants did not cross appeal on that issue pursuant to 74(b) U.R.C.P. and, as stated in the Utah Supreme Court's Statement of Fact, instead of receiving one-third of the amount of the sale, the farm must be divided and one-third of the land given to the widow. The question presented to and decided by the Utah Supreme Court was whether § 75-10-3 and 75-10-17 modify the provisions of § 74-4-4 and 74-4-3. The Court held they had not. Appellants, by choosing not to appeal the decision of the District Court did not properly present to the Utah Supreme Court the constitutional question which they now wish to present to the United States Supreme Court.

Therefore, considering the rapid trend toward equalizing property rights, the facts that no other states would be affected by a ruling on this matter on appeal, that this question becomes moot for all others similarly situated in Utah after July 1, 1977, and that the question was not properly brought before the Supreme Court, the appeal should be dismissed as presenting no substantial federal question.

POINT II

THE JUDGMENT OF THE STATE COURT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

The Utah Supreme Court did not rely on the constitutional provisions of the Fourteenth Amendment in holding that Appellee is entitled to make the election against the decedent's will as provided by § 74-4-3, U.C.A. 1953. Rather, it ruled that the statutes § 74-4-3 and 74-4-4, when harmonized with 75-10-3 and 75-10-17, allowed the widow her statutory share of decedent's property of which he died seised as a matter of state law. The Utah Supreme Court only secondarily disposed of the constititonal issue brought on appeal, having first decided the controversy on the basis of state law. The decision reads, in pertinent part:

> If this Court were to adopt respondents' argument that the filing of the election waived or withdrew the widow's objection to the sale, she would be deprived of her statutory fee simple interest and required to accept one-third of the proceeds of the sale in lieu thereof. There is no statutory or case law to support such a result nor to deprive her of the right to elect against the will.

It is well settled law that a judgment must have rested on the basis of a federal question. Nor is it enough that

a federal question sought to be raised as the basis of a case is passed upon, but the case is apparently decided upon the basis of a state statute. This is not a federal question. *DeSaussure v. Gaillard,* 127 U.S. 216, 32 L. Ed. 125, 8 S. Ct. 1053 (1888). Further, this Court will not even review a decision if it may have been rendered upon a ground not involving a federal question, *McGoldrick* v. *Gulf Oil Corp.,* 309 U.S. 2, 60 S. Ct. 375 (1940).

The decision clearly rests on a non-federal basis, specifically, that the widow (the Appellee in this action) complied with all appropriate requirements of § 74-4-3 and 74-4-4 and that 75-10-17 in particular, does not modify the former. Since the decision rested on an adequate non-federal basis, Appellant's appeal should be dismissed as provided in Rule 16(b), Supreme Court Rules.

POINT III

A DETERMINATION OF THIS APPEAL ON ANY BASIS EXCEPT DISMISSAL WOULD VIOLATE THE LONGSTANDING POLICY OF THIS COURT'S REFUSAL TO CONSIDER HYPOTHETICAL OR CONTINGENT QUESTIONS.

Appellants argue strenuously that it is important to determine the future rights of persons in disposing of their real property by will and that state legislatures must be informed of equal protection requirements. Such concern is admirable but does not constitute the basis on which this Court decides to hear controversies. Appellants may not maintain an action "for a mere declaration in the air." *Giles* v. *Harris,* 189 U.C. 475, 486, 23 S. Ct. 639, 47 L. Ed. 909 (1902).

Here, Appellants are not widowers seeking relief on an equal basis with Appellee; they are merely directing

this Court's attention to a question contingent upon a decision of state law.

In *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 56 S. Ct. 466, 80 L. Ed. 688, 711 (1936) the decision states:

> 2. The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. . .
>
> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case can be disposed of. . .

Clearly, this Court would be anticipating a constitutional question since Appellants would not be gaining any property rights affecting them. Their question simply states a hypothetical situation not reflective of the facts. The proper party to question the statutes would be that of a surviving husband who should claim a one third right in decedent wife's estate of real property.

Secondly, it is the policy of this Court to compensate the victims of discrimination rather than withhold a right from those persons benefiting from the discrimination where a statute is defective because of underinclusion as contended by Appellants. Even if the Court were to compensate males by extending the statutes in question, these Appellants would not gain any rights or relief. The question they present is totally hypothetical given the facts.

It is a longstanding rule that in equal protection questions this court will extend coverage to the aggrieved. Mr. Justice Harlan noted in a concurring opinion in *Welsh v. United States,* 398 U.S. 333, 361 (1961), a court may "extend the coverage of the statute to include those who are aggrieved by exclusion." Examples of such

extension include the Court's extending jury service from only "electors" to enfranchised blacks in 1880. *Neal v. Delaware,* 103 U.S. 370. In *Sweat v. Painter,* 339 U.S. 637 (1950), the Court expanded laws regarding access to state institutions of higher learning so that black students have equal access. And in *Levy v. Louisiana,* 391 U.S. 68 (1968), the Court expanded the rights of illegitimate children by allowing them to recover wrongful death benefits equal to legitimate children.

The Utah legislature has already deemed it appropriate to extend these property rights to males as evidenced by the ratification of the Utah Uniform Probate Code. Had the legislature thought it necessary to make this effect retroactive, it should have done so. Rather, considering the grave implications on marriage, probate, and property law, it prudently postponed the effective date to a future day which is now less than a month away, to allow persons affected notice of change.

Considering the tangential relation this constitutional question bears to Appellants and the impending amelioration of disparity, the Court should dismiss the case on the ground that the issue raised is merely declaratory and hypothetical to Appellants.

CONCLUSION

The appeal should be dismissed for three reasons: First, there is no substantial federal question. Secondly, the judgment of the Court below rests on an adequate non-federal basis. The Utah Supreme Court clearly decided the controversy prior to a determination of a federal issue. Thirdly, only a dismissal is appropriate where a question is hypothetical or contingent.

For the above reasons, this Court may dismiss an appeal brought under 28 U.S.C. Section 1257(2).

Respectfully submitted,

APPENDIX

IN THE DISTRICT COURT FOR CACHE COUNTY, UTAH

In the Matter of the Estate of JOSEPH R. BAER, Deceased	PROBATE NO. 7909 MEMORANDUM DECISION

The widow of the above named deceased has filed an objection to the sale of property on the grounds that she need not take under the will, but to receive by election one third in value of the legal or equitable estates in real property pursuant to Section 74-4-3 UCA and 74-4-4 UCA and that therefore the sale of realty should not be approved.

The court holds that the sale may be approved. Further that the direction of sale must be observed as provided by Section 75-10-3 and that pursuant to Section 75-10-17 UCA the widow need not consent to such sale but only reecive notice of the same. To hold otherwise, this court feels, would be in violation of the equal protection provisions of the Utah Constitution and the United States Constitution. Objections to the said sale are hereby denied and counsel for executors is hereby requested to prepare an order in conformance with this Memorandum Decision.

DATED June 4, 1976.

VeNoy Christofferson, District Judge